Petition

81-1185

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD LAWRENCE STEVENSON,

Petitioner,

v.

GRENTEC, INC., et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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(11810)

QUESTIONS PRESENTED

I. Whether this Court should review the directly conflicting decisions of two Federal Appellate Courts regarding the validity of the same U.S. Patent?

II. Whether a decision of the U.S. Court of Customs and Patent Appeals ruling that a U.S. patent is valid, following a full trial of the case, should prevail over a subsequent decision of a Circuit Court of Appeals holding the same patent invalid based on the same evidence and summary judgment proceedings?

III. When secondary factors showing non-obviousness of an invention are considered by one Federal Appellate Court and found to sustain the validity of a U.S. patent, should other Federal Appellate Courts thereafter be required to also

consider the secondary factors of non-obviousness in determining the validity of the same patent?

Parties to the proceeding in the Court of Appeals were: Richard Lawrence Stevenson, Mojo Boards, South Bay Recreational Products Inc., and, Wayne Brown dba Wayne Brown Surfboards. Pursuant to Rule 28.1 Petitioner believes that all defendants and potential respondents except South Bay Recreational Products Inc. are bankrupt (See Appx. pp. a66-a68).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

No. _____

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Richard Lawrence Stevenson,

Petitioner

-v-

Grentec Inc., et al

Respondents.

----------x

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 27, 1981.

OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit, which forms the

basis for this petition, was made Jul.27, 1981. 652 F2d 20. The directly conflicting decision of the United States Court of Customs and Patent Appeals was made Dec. 20, 1979. 612 F2d 546. Both opinions as well as that of the U.S. District Court for the Central District of California entered Oct. 26, 1979 are reproduced in the attached Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 27, 1981, a timely petition for a rehearing was filed and an Order denying the petition was filed Sept. 23, 1981 (copy included in Appendix.

This Court has jurisdiction pursuant to 28 USC §1254(1).

STATUTE

The pertinent provision of the United States Patent laws is Title 35,

United States Code, §103 as follows:

"§103. Conditions for patentability; non-obvious subject matter

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

STATEMENT OF CASE

Conflict exists between two Federal Appellate Courts as to the validity of

U.S. Patent No. 3,565,454 entitled "Skateboard with Inclined Foot-Depressible Lever" issued Feb. 23, 1971, for which Richard Lawrence Stevenson is the designated sole inventor.

Some men seem born to devote enormous time and hard work to help their dreams come true and take great personal risks to transform their creations into marketplace realities. Stevenon, who has spent his entire life in various phases of sports, is within this category.

In 1968 Stevenson turned his attention to the rapidly declining skateboard industry and set out to save it, if he could, by designing a new and improved skateboard. Driven by inspiration and desire, he devised the now famous product which has come to be known internationally as the "kicktail" skateboard. His patent application was filed on

Jun. 12, 1969 and, owing to the readily apparent merit of the claimed invention, his application was greeted with a first office action allowance by the Examiner in the U.S. Patent & Trademark Office and a patent was soon granted.

The unique breakthrough and sales potential of Stevenson's kicktail skateboard was appreciated by domestic and foreign imitators, who, predictably copied his invention.

Seeking remedies for violating his valuable property rights, in 1965 Stevenson commenced a number of infringement suits in the United States District Court for the Central District of California under the U.S. patent laws contained in Title 35 of the United States Code. Jurisdiction was predicated upon 28 USC §1338(a). The District Court consolidated some of the suits on May 19, 1976 into single case.

Due in part to delays before the District Court, and the many foreign manufacturers who were exporting their "knock-off" kicktail skateboards into the United States, Stevenson commenced an action in the Unitee States International Trade Commission. An official investigation was instituted by the ITC on Nov. 4, 1977, on the basis of Stevenson's Amended Complaint pursuant to §337 of the Tariff Act of 1930, as amended, and 19 USC §1337, charging unfair methods of competition and unfair acts of importing infringing articles.

Simultaneous cases before the District Court and the ITC set the stage for the subsequent clash of decisions between the two Federal Appellate Courts.

Before the District Court Stevenson believed he had a sufficiently powerful case to justify favorable disposition by way of summary judgment. The statutory

presumption of validity, i.e, 35 USC §282 was strengthened by the widespread copying, commercial success and other factors demonstrating non-obviousness of his invention. Moreover, Mr. Hobie Alter the inventor of the only seemingly relevant prior art, i.e., the "rocker" board fully supported Stevenson's position stating that the "purpose" of his "rocker" board was to simulate the "design concept of surfboards" and that the kicktail skateboard was "a separate and distintively different concept than the rocker" and that it was "original with Larry Stevenson" (Appx., pp. a62, a63, a64).

Cross motions for summary judgment were heard by the District Court on Dec. 6, 1976, and a Civil Minutes Order declaring the kicktail patent invalid was filed Jun. 30, 1978 (Appx., p. a24). An opinion with corresponding findings

and conclusions was not entered by the District Court until Oct. 26, 1979 (Appx., pp. a13-a23). While referring to the Stevenson invention as "very simple" (Appx., p. a16), the District Court took about three years after the hearing to render its opinion.

In disposing of Stevenson's patent by summary judgment, the District Court ignored a solid barrier of specific material facts, which both supported his motion and, at the very least, controverted facts advanced by the defendants and established ample reason for denying their motions for summary judgment to declare the kicktail patent invalid. Stevenson timely appealed to the Court of Appeals for the Ninth Circuit to review this technical decision.

In the meanwhile a full trial on the merits was conducted before an

Administrative Law Judge (ALJ) of the U.S. International Trade Commission who issued a recommendation on Jul. 17, 1978 that some of the claims contained in the Stevenson patent were invalid. In a split decision of Nov. 13, 1978 the ITC accepted the recommendation and ruled the kicktail patent invalid but infringed. (204 United States Patents Quarterly (USPQ) 267.)

An appeal was taken from the ITC by Stevenson to the United States Court of Customs and Patent Appeals, which by its decision of Dec. 20, 1979, 612 F2d. 546, reversed the ITC and ruled the kicktail patent both valid and infringed (Appx., pp. a25-a61).

The conflict between the two Federal Appellate Courts can only be explained by the utter disregard of the District Court and the Court of Appeals

for the Ninth Circuit relative to Stevenson's overwhelming evidence of non-obviousness. Neither looked beyond the superficial aspects of the kicktail skateboard because each thought it to be merely "simple".

Moreover, in attempting to justify its decision and perhaps reconcile it with that of the Court of Customs and Patent Appeals, the Court of Appeals for the Ninth Circuit showed total misapprehension of the very thorough proceedings employed by and the scope of the evidence presented at the ITC trial. This is readily apparent from the following incorrect observations by the Court of Appeals of the Ninth Circuit:

> "the foreign corporations failed to present evidence that the invention was within the ordinary skills of an average skateboarder..." (Appx., p. a9).

"Unlike the foreign defendants, Grentec presented evidence and the District Court found as a fact that the kicktail skateboard was within the ingenuity of the average skateboarder". (Appx. p. a9).

In fact all of the evidence presented by Grentec and the other defendants in the District Court was also presented by the foreign defendants at trial before the ITC.

All the actual and alleged prior art as well as portions of the Stevenson deposition developed before the District Court was introduced and used against Stevenson at the ITC trial. Voluminous additional evidence and testimony by multiple U.S. citizens was also presented in a direct attack against the kicktail patent.

The "rocker" and related skateboards

were indeed evidence at the ITC trial - and the "rocker" skateboard in particular is referred to throughout both the ITC decision, 204 USPQ 267 and the decision of the Court of Customs and Patent Appeals, 612 F2d. 546 (Appx. pp. a25-a61). Indeed the "rocker" skateboard was the most critical evidence presented against the kicktail skateboard. The two excerpts above of the Court of Appeals for the Ninth Circuit vividly demonstrate its mistakes and misapprehensions regarding the proceedings before the ITC and its apparent willingness to adopt a technical summary judgment and sweep away the kicktail patent.

Some of the primary and secondary evidence of non-obviousness presented by Stevenson to the District Court and entirely overlooked and disregarded by the Court of Appeals for the Ninth Circuit is identified as follows:

(a) Pro/Am Skateboard Racing Assn. survey and affidavit of Pres. Richard W. Graham; showing survey results, comparisons between kicktail, rocker and other skateboards and the striking advantages and results achieved by Stevenson's kicktail skateboard [same documentary evidence and live testimony of Mr. Graham submitted at ITC trial and considered by Court of Customs and Patent Appeals](see Appx., p. a48).

(b) Expert opinion and report of Robert L. Radkey, Research Scientist, Aero-Vironment Inc.; showing many positive and specific advantages of Stevenson's invention and scientific, mechanical and biomechanical areas and the great functional advantages of Stevenson's

invention over the rocker board [same documentary evidence and live testimony of Mr. Radkey submitted at ITC trial and considered by Court of Customs and Patent Appeals] (see Appx. pp. a47-48).

(c) Affidavits of five competition skateboarders; showing Stevenson's invention to possess surprising and remarkable functional advantages, increased maneuverability, control, safety, etc. and great superiority over the rocker board and others [same evidence submitted at ITC trial considered by Court of Customs and Patent Appeals] (see Appx., pp a8-a9).

(d) Hobie Alter declaration; showing that his prior art "rocker" board was merely designed to

simulate the appearance of surf-boards and that Stevenson's kicktail skateboard was a separate and distinct invention [rocker board submitted at ITC trial and considered by Court of Customs & Patent Appeals] (see Appx., p. a39).

At the hearing before the Court of Appeals for the Ninth Circuit on Jun. 3, 1981, no defendant was represented. Stevenson's Petition for a Rehearing was not opposed and in fact was supported by the only surviving defendant, South Bay Recreational Products, Inc., who, through its President, informed the Court of Appeals for the Ninth Circuit that ".. all of the other three defendants named in this case are bankrupt, in liquidation or have otherwise discontinued business operations", and that in retrospect, he

believes the Stevenson patent to be "entitled to protection and enforcement" (Appx., pp. a66-a88). As the matter now stands, Stevenson has been stripped of his patent by one Federal Appellate Court and given maximum nationwide protection by another Federal Appellate Court.

REASONS FOR GRANTING THE WRIT

This Court is urged to exercise its discretion in favor of granting the writ for the following reasons:

1) to resolve direct conflict in final decisions of two Federal Appellate Courts regarding the same U.S. patent;

2) to determine whether the earlier decision of the U.S. Court of Customs and Patent Appeals holding petitioner's patent valid should be given a supervening national effect over

the subsequent and conflicting decision of the U.S. Court of Appeals for the Ninth Circuit;

3) to provide guidelines on when Federal Courts must consider secondary factors of non-obviousness in determining the validity of a patent.

I. A Direct Conflict Exists Between Two Appellate Courts as to the Validity of the Same Patent.

A foremost reason for the issuance of a writ by this Court is when two Federal Appellate Courts have rendered conflicting decisions on the very same matter. Rule 17(.1)(a).

Conflict between two Appellate Courts pertaining to the validity of the same patent, provides a traditional reason for this Court to exercise its discretion to review the case. Graham v. John Deere Co. 383 US 1 (1966);

Blonder-Tongue Inc. v. University of Illinois Foundation 402 US 313 (1971).

The same is true of conflicting decisions between Federal Appellate Courts pertaining to copyrights. Mazer v. Stein 347 US 201 (1954). Specific Federal power for patents and copyrights stems from the same source in the U.S. Constitution, i.e., Article I, §8.

As indicated by this Court in Universal Oil Products Co. v. Globe Oil & Refining Co. 322 US 471 (1944):

> "But in resolving conflicting views of two Circuit Court of Appeals as to a single patent, we are obliged to undertake an independent re-examination of the factual questions. Sanitary Refrigeration Co. v. Winters, 280 US 30, 35-36".

The reason for issuing a writ is heightened when the conflict relates to

the validity of a patent that describes a particularly popular and commercially important invention, such as Stevenson's kicktail skateboard. Patents in general are affected with a public interest. If this Court does not issue a writ to resolve the conflict, it cannot otherwise be resolved and a cloud of uncertainty will persist.

II. Barring Intervention by this Court, A Decision on Patent Validity by the Court of Customs and Patent Appeals Should Control Over a Conflicting Decision by a Circuit Court of Appeals.

While this petition is urging a review of the decision of the Court of Appeals for the Ninth Circuit, 652 F2d. 20 (Appx., p. a1) rather than the decision of the Court of Customs and Patent Appeals, 612 F2d. 546 (Appx.

p. a25), the general considerations that control review are the same for both Appellate Courts. Rule 17(.2).

The final and non-appealable judgment of the Court of Customs and Patent Appeals entered Dec. 20, 1979 has resulted in an exclusion order of Oct. 9, 1980 by the International Trade Commission, barring foreign manufacturers from exporting their infringing kicktail skateboards into the U.S. 19 USC §1337. The decision of patent validity and infringement by the Court of Customs and Patent Appeals has both a nationwide effect and a substantial impact on foreign commerce.

The decision of the Court of Appeals for the Ninth Circuit which embraces nine Western states and Guam, has less impact in terms of territory and parties. Nonetheless, an irreconcilable clash has been created and only

this Court can resolve the matter.

The Court of Customs and Patent Appeals is a "..a Court established under Article III of the Constitution of the United States" 28 USC §211 and as such is "..a constitutional Court exercising judicial rather than administrative power". Brenner, Comr. Pats. v. Manson 383 US 519 (1966).

The conflict presented in this case is not one between an administrative appeals court which has merely decided that a patent application should be allowed and a Circuit Court of Appeals that has ruled on validity following a plenary trial. Much to the contrary, the Court of Customs and Patent Appeals, has ruled on the issue of validity and infringement after a full trial on the merits whereas the Court of Appeals for the Ninth Circuit has ruled upon the issue of validity

after an abbreviated and summary judgment proceeding.

Since the Court of Customs and Patent Appeals (a) is a full Constitutional Court with nationwide jurisdiction; (b) is a Court with considerable expertise in patent matters; (c) has performed judicial review of a case that was fully tried and included all of the adverse evidence presented against the Stevenson patent in the District Court; and (d) rendered its decision long prior to that of the Appellate Court for the Ninth Circuit - the decision of the Court of Customs and Patent Appeals may and should be given controlling effect over that of the Court of Appeals for the Ninth Circuit. An objective of pending legislation, i.e., S.21 97th Congress, 1st Session, bill introduced Jan. 5, 1981, is to establish a U.S. Court of Appeals for the Federal Circuit

and confer exclusive jurisdiction over appeals from patent infringement suits.

This is a case of first impression. In part because of the recent expanded and/or recognized jurisdiction of the United States International Trade Commission to conduct full patent infringement trials and the jurisdiction of the Court of Customs and Patent Appeals to review patent infringement decisions from the United States International Trade Commission - there have been no prior conflicting decisions on the issue of patent validity and/or infringement between a Circuit Court of Appeals and the Court of Customs and Patent Appeals.

III. Standards Should Be Provided by This Court As to When Secondary Factors of Non-Obviousness Must Be Considered in Determining Patent Validity.

The diametrically opposed decisions by the two Federal Appellate Courts arose because each treated the issue of non-obviousness, i.e., 35 USC §103 very differently.

Giving full consideration to both primary and secondary factors bearing on the non-obviousness of Stevenson's invention, the Court of Customs and Patent Appeals found the patent valid. Giving no consideration to secondary factors and only a cursory consideration to primary factors, the Court of Appeals for the Ninth Circuit found the very same patent invalid. The latter Court paid tribute to the former Court by noting "To be

sure, the decisions of the Court of Customs and Patent Appeals should be given great weight and treated with respect; they are not, however, binding on this Court,(Appx. p. a8-a9). Nonetheless the Court of Appeals for the Ninth Circuit, being fully mindful of the prior decision of patent validity and infringement, refused to even reverse the District Court's summary judgment and remand for trial.

Both Federal Appellate Courts commented extensively on this Court's decision of Graham v. John Deere Co. 383 US 1 (1966) which sets forth some of the standards for testing non-obviousness of inventions and provides that inquiry into secondary factors "may have relevancy".

Whereas the Court of Customs and Patent Appeals held "...it is necessary that such secondary considerations also

be evaluated in determining the final validity..." (Appx. p. a51) the Court of Appeals for the Ninth Circuit held secondary factors may and in this case should be ignored. By positing a rule that "Where patents are obvious they cannot be saved from invalidity by resorting to secondary factors" (Appx. p. a10) the Court of Appeals for the Ninth Circuit sanctions a complete disregard of secondary factors.

Where one Federal Appellate Court considers substantial evidence of secondary factors showing non-obviousness and determines a patent to be valid, a subsequent Federal Appellate Court ought to be bound to weigh and consider the same evidence and inquire into the corresponding secondary factors. Otherwise, a decision by the subsequent Federal Appellate Court is apt to be arbitrary and capricious.

Clearly, when the question of non-obviousness becomes so "close", as in the case of evaluating Stevenson's invention, the need and requirement to consider secondary factors becomes compelling. Occasionally the Court of Appeals for the Ninth Circuit recognizes that secondary factors of non-obviousness must be considered, one panel in Reeves Instrument Corp. v. Beckman Instruments Inc. 444 F2d. 263 (9th Cir 1971) noting it is "difficult" to look only to the primary factors in attempting to solve the non-obviousness question in that "such determination can be made only by an analysis" of some secondary factors. So why did the Court of Appeals for the Ninth Circuit abandon this occasional approach in analyzing Stevenson's invention?

In this Court's companion case of U.S. v. Adams 383 US 39 (1966) the

validity of a patent directed to a relatively simple invention was upheld in part because secondary factors of non-obviousness were considered and given weight.

There may be a tendency in human nature to believe a "simple" i.e., uncomplicated, invention is old or otherwise undeserving. Surely the District Court believed Stevenson's invention was "very simple" (Appx. p. a16) and then closed the door to all evidence likely to show that a "simple" invention could ever be non-obvious. The Court of Appeals for the Ninth Circuit approved and observed that "the trial court's failure to consider secondary factors is not reversible error" (Appx. p. a10) and furthermore that the District Court was "not required to consider secondary factors" (Appx. p. a11). What special conditions existed to exempt the District

Court from giving the Stevenson patent a fair shake by completely disregarding very strong evidence of secondary factors showing non-obviousness of his invention?

If judicial inquiry into non-obviousness were always halted in instances of "simple invention" they would have no protection under the patent laws. Simple angular changes in well known devices may very well be non-obvious and entitled to patent protection. Eibel Process Co. v. Minnesota & Ontario Paper Co.,261 US 45 (1923). While hindsight may make an invention seem "simple" and therefore obvious, this is not the test and should not foreclose a full consideration of secondary factors. Goodyear Tire & Rubber Co. v. Ray-O-Vac Co. 321 US 275 (1944).

Giving further impetus to the need for considering secondary factors of

non-obviousness relative to Stevenson's invention is the undisputed fact that it was relatively revolutionary. Smith v. Snow 204 US 1 (1935). The Court of Customs and Patent Appeals noted that "kicktail skateboards constitute approximately 90-95% of production and sales in the skateboard industry" (Appx., p. a51).

IV. Disputed Facts Regarding Non-Obviousness Shown by the Conflicting Decisions, Indicate that Summary Judgment was Inappropriate.

The very decision of patent validity by the Court of Customs and Patent Appeals dramatically demonstrates how the same evidence presented by Stevenson to the District Court was sufficient, as a matter of law, to create material disputed fact issues, sufficient to defeat Defendants' motions for summary

judgment.

It is the law of the land that on a motion for summary judgment, the moving party has the burden of showing the absence of a genuine issue of material fact - and - evidence to support a motion for summary judgment must be viewed in a light most favorable to the party against whom the motion is directed. Adickes v. S. H. Kress & Co. 398 US 144, (1970).

Stevenson presented powerful evidence of non-obviousness to the District Court, falling into both categories of primary and secondary factors, sufficient to dispute the superficial facts advanced by the defendants in support of their motions for summary judgment. Some of the evidence presented by Stevenson but rejected or overlooked by the District Court and subsequently the Court of Appeals for the Ninth Circuit, made the

following impact on the Court of Customs and Patent Appeals:

> "Appellant's witness, Mr. Graham, is president of the Pro-Am Skateboard Racing Asso., and has worked actively organizing various skateboard competitions. He testified that the kicktail provides definite advantages in performing free-style maneuvers. At appellant's request, Mr. Graham conducted a survey of the 500 members of his association, with 45% responding to the survey requests. The survey comprised 19 questions. A substantial number of members had ridden the flat, the rocker and the kicktail. The results of the survey indicated a decided preference for the kicktail" (Appx. p.a48).
>
> "Appellant's witness Mr. Radkey, is a research scientist for a firm engaged by appellant to conduct an analysis of mechanical advantages of the geometry of the kicktail deck over the flat and rocker decks. His conclusions drawn from this analysis clearly support specific advantages for the kicktail deck." (Appx. p. a47)
>
> "Mr. Stevenson submitted a collection of five affidavits. The five affiants are all experienced skateboarders with competitive experience, some professional. The affiants all

> have ridden flats, rockers and kicktails and all find the kicktail to be superior to the others. The affiants all agree far greater maneuverability is possible with the kicktail. They all cite particular problems of imbalance associated with the rocker board" (Appx. p. a49).

Showing further error with regard to applying the test of non-obviousness, the District Court found the Stevenson patent to be obvious "in February 1971 when the suit patent was issued" (Appx p. a19) and repeated the same misconception later in its opinion (Appx. p. a20). Neither summary judgment nor any other type of final adjudication may stand when such a misconception of basic patent law principles is evinced.

The statutory law on "obviousness" 35 USC §103 requires that it be determined "...at the time the invention was made..." not when the "patent was issued". The Stevenson patent was granted in February 1971 but the "invention was made"

a couple of years earlier. Thus the District Court invalidated Stevenson's kicktail patent for being obvious at the time it was issued, a determination by hindsight that was legally improper. Approval of this determination and summary judgment disposition by the Court of Appeals for the Ninth Circuit likewise constitutes an utter misapprehension of the law.

If this Court exercises its discreation to grant a writ in order to resolve the conflict between two Federal Appellate Courts and rule on other major issues presented by this petition - it may also choose to provide guidelines to the Court of Appeals for the Ninth Circuit regarding its improper approval of summary judgment proceedings and incorrect interpretation of the time when non-obviousness/obviousness shall be determined under 35 USC §103.

CONCLUSION

Only this Court can resolve the direct conflict in legal decisions of the Court of Appeals for the Ninth Circuit and the Court of Customs and Patent Appeals regarding the validity of petitioner's U.S. patent.

The relative force and effect of conflicting decisions between the Court of Customs and Patent Appeals and a Circuit Court of Appeals can only be clarified by this Court.

The very heart of the U.S. patent laws is contained in the concept of obviousness embraced in 35 USC §103 and there is a vital need to provide guidelines supplementing those set forth in Graham v. John Deere. Due to general widespread conflict among the Federal Courts, only this Court can prescribe a national policy as to when

consideration of secondary factors of non-obviousness shall be mandatory rather than permissive in determining the validity of patents.

This Court may, in its discretion, also see fit to provide guidelines on the inappropriateness of ignoring evidence of secondary factors to invalidate patents by summary judgment proceedings, especially when strong evidence of non-obviousness has been considered and deemed persuasive of validity in a prior decision by a Federal Appellate Court.

This case is ripe for review by this Court and for the foregoing reasons the petition should be granted.

Respectfully submitted,

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Appendix

APPENDIX

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Argued and Submitted Jun 3, 1981

Decided July 27, 1981

PRESENT:

Hon. Judges DUNIWAY, CANBY and BATTIN.

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Richard Lawrence STEVENSON,
Plaintiff-Appellant,

-v-

GRENTEC.,
Defendant-Appellee.

Richard Lawrence STEVENSON,
Plaintiff-Appellant,

-v-

MOJO BOARDS, South Bay
Recreational Products, Inc.,
Defendants-Appellees.

Richard Lawrence STEVENSON,
Plaintiff-Appellant,

-v-

Wayne BROWN d/b/a/ Wayne
Brown Surfboards,
Defendant-Appellee.

----------x

Nos. 79-3771, 79-3772, and 79-3773.

Appeal from the United States

District Court for the Central District

of California.

Stevenson appeals the ruling of the district court granting Grentec's motion for summary judgment and declaring his patent invalid as obvious. We affirm.

In 1971, Stevenson received a patent for a skateboard with a foot depressible lever at one end or at both ends of the board (kicktail board). The kicktail invention improved the maneuverability and safety of skateboards by minimizing or eliminating the problems of foot slippage and grounding and by enhancing the rider's "foot feel" and "leverage".[1] The core of Stevenson's invention was an extension forming a slight curve or inclincation at the rear of the skateboard. The

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1. Foot slippage refers to the tendency of a rider's foot to slip off the rear end of the board when the end is depressed in the performance of spinning maneuvers (wheelies). Grounding is scraping the back tip of the board on the ground when the rear end is depressed.

particular inclination was not critical, however; any acute angle was adequate.

In 1975, Stevenson brought this patent infringement suit against Grentec, Mojo Boards and Brown. The defendants counterclaimed seeking a declaratory judgment that the patent was invalid as obvious. Both sides moved for summary judgment. The trial court found that the prior state of art was the "rocker" or spoon skateboard, a concave, generally uniformly curving board which terminates in opposite ends sloping upward beyond the remainder of the board. It concluded that Stevenson's invention was not beyond the ordinary skill of the average skateboarder and accordingly held the patent invalid as obvious.

While Stevenson's action was pending in district court, he filed a petition before the United States International Trade Commission against four foreign

corporations. Stevenson sought a permanent order of exclusion from importation into this country of skateboards covered by his patent. The administrative law judge and the Commission found that in view of the prior art, Stevenson's patent was invalid as obvious. The Commission's determination was reversed by the Court of Customs and Patent Appeals. Stevenson v. International Trade Commission, 612 F.2d 546 (CCPA 1979). That court concluded that Stevenson's invention was not obvious and the patent was therefore valid.

1. Premature Filing of Notice of Appeal

[1] Although the trial court granted defendant's motion for summary judgment in an opinion and order dated Oct. 26, 1979, judgment was not entered until Nov. 30, 1979. On Nov. 26, 1979 Stevenson filed his notice of appeal with the district court. Appellant's premature

filing does not divest this court of jurisdiction. We have held on several occasions that premature notices will be regarded as taken from the subsequently filed final order. Ruby v. Secretary of the Navy, 365 F.2d 385 (9th Cir 1966) (en banc) cert. denied, 386 U.S. 1011, 87 S. Ct. 1358, 18 L.Ed. 2d 442 (1967); Firchau v. Diamond National Corp., 345 F.2d 269, (9th Cir 1964).

2. Presumption of Validity:

[2, 3] Before reaching the issue of obviousness, Grentec must overcome the presumption that Stevenson's patent is valid. Grentec contends that in this instance the presumption was vitiated because Stevenson failed to include the "rocker" skateboard in his presentation to the patent examiner of the pertinent prior art. See Del Mar Engineering Laboratories v. Physio-Tronics, Inc., 642 F.2d 1167, 1173 (9th Cir 1981); NDM Corp. v.

Hayes Products, Inc., 641 F.2d 1274 1276-77 (9th Cir 1981). Stevenson responds that the rocker board is not pertinent art because he had different design concerns. The district court made no express finding regarding the presumption,[2] but in light of the court's conclusion that the rocker board was pertinent prior art, evidently concluded that the presumption was dissipated. We agree.

3. Obviousness:

35 U.S.C. §103 provides:

A patent may not be obtained ... if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time

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2. The trial court's failure explicitly to state the presumption was overcome is not prejudicial error. NDM Corp. v. Hayes Products, Inc., 641 F2d at 1277; Hewlett-Packard Co. v. Tel-Design, Inc. 460 F2d 625, 628 (9th Cir 1972).

the invention was made to a person having ordinary skills in the art to which said subject matter pertains.

[4] Although obviousness is a legal determination, it is resolved against a background of three factual inquiries initially set forth in Graham v. John Deere Co., 383 U.S.1, 86 S.Ct. 684, 15 L Ed. 2d 545 (1966). The trial court must determine: (1) the scope and content of of the prior art; (2) the difference between prior art and the claimed invention; and (3) whether the new invention could have been developed by a person of ordinary skills who is familiar with the pertinent art. See NDM Corp. v. Hayes Products Inc., 641 F.2d at 1277; Houston v. Polymer Corp., 637 F.2d 617, 618-19 (9th Cir 1980).

The trial court found the "rocker" skateboard was the most relevant prior art. The only significant difference

between that skateboard and the Stevenson patent was the angle of inclination of the curved portion of the platform extending beyond the wheels. Stevenson admitted, however, that the actual degree of inclination was not critical but one of personal choice. As early as 1966, skateboard riders of ordinary skill were adjusting the curvature of their boards to suit their personal preferences and to increase maneuverability. The court concluded that the ingenuity required to make the adjustment in the skateboard's structure as claimed in the Stevenson patent was "no more than that to be expected of a skateboarder skilled in the art".

[5] Although the Court of Customs and Patent Appeals (CCPA) found the patent valid, we nonetheless affirm the district court's ruling. To be sure, the decisions of the Court of Customs and

Patent Appeals should be given great weight and treated with respect; they are not, however, binding on this Court. Plastic Contact Lens Co. v. Gottschalk 484 F2d. 837, 839 (DC Cir 1973).

The CCPA proffered two reasons for upholding the patent: (1) the foreign corporations failed to present evidence that the invention was within the ordinary skills of an average skateboarder; and (2) the kicktail skateboard was commercially successful. In this case, the first reason does not apply and the second one is not controlling.

Unlike the foreign defendants, Grentec presented evidence and the district court found as a fact that the kicktail skateboard was within the ingenuity of the average skateboarder. The court's finding must be sustained unless clearly erroneous. Photo Electric Corp. v. England, 581 F2d 772, 776 (9th Cir 1978).

We do not find it so.

Nor is the commercial success of the invention dispositive. In contrast to the CCPA, the district court did not consider this criterion. In Graham, the Supreme Court acknowledged that secondary factors such as commercial success, the extent to which the invention resolved long-felt needs, and the difficulty of the problem solved could be considered in determining whether or not a patent was valid. This court has stated, however, that the trial court's failure to consider secondary factors is not reversible error, and their presence or absence is not of itself determinative of obviousness. NDM Corp. v. Hayes Products, Inc., 641 F.2d at 1280. Where patents are obvious, the cannot be saved from invalidity by resorting to secondary factors. NDM Corp. v. Hayes Products Inc., supra; Jeddeloh Brothers Sweed

Mills, Inc. v. Coe Manufacturing Co. 375 F.2d 85, 91 (9th Cir) cert. denied 389 U.S. 823, 88 S. Ct. 57, 19 L.Ed. 2d 76 (1967).

[6] In this case, the district court had ample evidence from which to conclude that the Stevenson patent was obvious. It was therefore not required to consider secondary factors. The district court's conclusion was not erroneous.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Richard Lawrence Stevenson,
Appellant,

-v-

Grentec, Inc.,
Appellee.

FILED
Sep.23, 1981

Nos. 79-3771, 79-3772, 79-3773.

Before: DUNIWAY and CANBY, Circuit Judges and BATTIN, District Judge.*

The petition for rehearing is denied.

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*The Honorable James Franklin Battin, U.S. District Judge, for District of Montana, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Richard Lawrence Stevenson,
Plaintiff,
-v-
Mojo Boards; South Bay Recreational Products, Inc.,
Defendants.

Richard Lawrence Stevenson,
Plaintiff,
-v-
Grentec, Inc.,
Defendant

ENTERED
Oct.26,1979

Richard Lawrence Stevenson,
Plaintiff,
-v-
Wayne Brown d/b/a/ Wayne Brown Surfboards,
Defendant.

Nos. 75-2297-RF; 75-3233-RF; and 75-4155-RF.

OPINION

These three actions all involve suits for alleged patent infringement. The three actions were consolidated by the Court's order on May 19, 1976. Each action concerns the same suit patent, No. 3,565,454, held by plaintiff.

The matter now before the Court is

presented by several summary judgment motions. Plaintiff Stevenson has filed for partial summary judgment on the issue of the suit patent's validity. Defendants Mojo Boards, South Bay Recreational Products, and Grentec, Inc. have filed cross-motions for summary judgment on various issues, including the validity of the suit patent. Defendant Wayne Brown has filed opposition to plaintiff's motion for partial summary judgment.

The plaintiff, Richard L. Stevenson, resides in the City of Los Angeles. The defendant Wayne Brown d/b/a/ Wayne Brown Surfboards has its princiipal place of business in Huntington Beach. The defendant Grentec, Inc. has its principal place of business in Burbank. The defendant South Bay Recreational Products has its principal place of business in Torrance. The defendant Mojo Boards has its principal place of business in Costa

Mesa. All the parties herein reside in the Central District of California.

Each of the three consolidated actions arises under the patent laws of the United States, 35 U.S.C. §§1 et seq. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1338. The Court has personal jurisdiction over all of the parties.

The suit patent was issued to plaintiff on Feb. 23, 1971. This patent describes the invention of a modified skateboard with an inclined "foot-depressible lever" on at least one end of the board's elongated platform. The lever's plane "slopes upwardly and rearwardly" from the plane of the skateboard's platform. Affifavit of Richard L. Stevenson, pp. 15-16 of plaintiff's motion papers; U.S. Pat. 3,565,454, col. 1, 11. 72-75. The allegedly innovative positioning of the lever is such as to

allow a person to depress the lever with one foot "to facilitate spinning the skateboard through a wheelie maneuver or the like." U.S. Pat. 3,565,454, col. 1 ll. 9-10.

The skateboard with the inclined depressible lever described in the suit patent is very simple and can be readily explained and understood without the use of expert testimony.

The state of the prior art is exemplified by the "spoon" or "rocker" type of skateboard. Defendants' exhibit E; plaintiff's exhibit 2. This prior art skateboard was marketed to the public as early as 1965. Affidavit of Richard L. Stevenson, p. 16 of plaintiff's motion papers. The "spoon" or "rocker" skateboard may be described as a one-piece molded platform with two sets of wheels attached. The portion of the platform extending beyond the rear set of wheels

slopes upwardly towards the end.

The only significant difference between the prior-art and the suit patent skateboards is the angle of inclination of the curved portion of the platform extending beyond the wheels. The actual degree of the angle of inclination is one of personal choice and not critical to the facility provided for the execution of wheelies.

As early as 1966, skateboard riders of ordinary skill were adjusting the curvatures of their boards to suit their personal preferences. Such changes in the skateboards' structures were made to promote the boards' capacities for maneuverability. Affidavit of Raymond M. Flores IV, pp. 22-23 of defendant Grentec's motion papers.

A patent in order to be valid must be non-obvious. 35 U.S.C. §103 provides, in pertinent part:

> "A patent may not be obtained ...if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains ....".

The ultimate question of a patent's validity is one of law infused with the factual issues developed in Graham v. John Deere Co. 383 U.S. 1 (1966); Astro Music, Inc. v. Eastham, 564 F.2d 1236 (9th Cir 1977). The factual issues of Graham encompass the following: (1) the scope and content of the prior art; (2) the differences between the prior art and the claims of the patent in issue; and (3) the level of ordinary skill in the pertinent art. Austin v.

Marco Dental Products, Inc. 560 F.2d. 966, 970 (9th Cir 1977).

As stated supra, the most important difference between the prior art and the suit patent skateboards is the angle of curvature at the end of the board's platform. The crucial question is whether this difference would have been obvious to the skateboarder of ordinary skill in February 1971 when the suit patent was issued. Cf. Austin, supra 560 F2d at 970.

The affidavit of Raymond M. Flores IV (pp. 22-23 of defendant Grentec's motion papers) indicates that as early as 1966 some skateboarders were modifying the countours of their boards' platforms for the same reasons the plaintiff declares as the reasons for the suit patent. U.S. Pat. No. 3,565,454 col. 1 ll. 9-10. The curvature of the prior art skateboard also was constructed with

the same intended purpose as that declared as the suit patent's purpose. Affidavit of Jay G. Stone, p. 20 of defendant Grentec's motion papers.

Even if the Court postulates the ordinary skill of the average skateboarder in 1971 to have been at the minimum level realistically conceivable, the changes in the skateboard's structure allegedly taught by the suit patent would have been obvious to that average skateboarder. See Bates Industries, Inc. v. Daytona Sports Co. 441 F.2d. 1110, 1112 (9th Cir 1971), cert. denied 404 U.S. 991 (1971); Walker v. General Motors Corp. 362 F2d. 56, 59-60 (9th Cir 1966).

The ingenuity required to make the adjustment in a skateboard's structure claimed in the suit patent was "no more than that to be expected of a [skateboarder] skilled in the art." Globe Linings, Inc. v. City of Corvallis,

555 F.2d. 727, 731 (9th Cir 1977) [Citation omitted].

It is clear that summary judgment is proper in the Ninth Circuit for a patent case when there are not any genuine issues as to material facts. Proler Steel Corp. v. Luria Brothers & Co. 417 F.2d 272, 273-74 (9th Cir 1969) and cases cited therein. There are no genuine issues concerning the material facts to support the conclusion that the suit patent is not nonobvious.

It would be superfluous to discuss the other issues raised by the parties regarding the validity of the suit patent and the alleged infringement by defendants in view of the above-stated conclusion.

The defendants have contended that the plaintiff committed fraud or otherwise acted in an equitable manner before the Patent Office in his efforts to

secure the suit patent. The defendants do not provide any firm evidence concerning the state of mind of the plaintiff in the latter's presentation of materials to the Patent Office. There has not been a showing that it would be "grossly unjust for the prevailing [parties] to be left with the burden of [their] litigation expenses." Maurice A. Garbell Inc. v. Boeing Co. 546 F.2d. 297, 300 (9th Cir 1976). The defendants have not made the showing required by Monolith Portland Midwest Co. v. Kaiser Aluminum & Chemical Corp. 407 F.2d. 288, 294 (9th Cir 1969).

The Court in its discretion determines that this is not an exceptional patent case pursuant to 35 U.S.C. §285.

IT IS HEREBY ORDERED:

1. The suit patent, No. 3,565,454 is invalid on the ground of obviousness;

2. No attorney's fees are awarded

to any party in these actions; and

3. The plaintiff's motion for partial summary judgment is denied; the counter-motions for summary judgment by defendants Mojo Boards, South Bay Recreational Products, and Grentec, Inc. are granted only to the extent that the suit patent is declared invalid due to obviousness.

The foregoing Opinion shall constitute the Court's findings of fact and conclusions of law in support of the above Order.

Defendants to submit proposed judgments within ten days.

DATED: Oct. 24, 1979.

Robert Firth
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTE ORDER

Nos. 75-2297-RF
75-3233-RF
75-4155-RF

FILED
June 30, 1978

Title: Stevenson v. Mojo Boards; Stevenson vs. Grentec; Stevenson vs. Wayne Brown
PRESENT: Hon. Robert Firth, Judge

Court orders plaintiff's motion for partial summary judgment is hereby denied. The cross motions for summary judgment filed by defendants Mojo Boards South Bay Recreational Products, and Grentec are hereby granted. The Court's own form of findings of fact and conclusions of law will be forthcoming.

COURT OF CUSTOMS AND PATENT APPEALS
612 F.2d. 546

Stevenson
v. International Trade Commission
et al, No. 79-12
Decided Dec. 20, 1979

Before Markey, Chief Judge, Rich, Baldwin, and Miller, Associates Judges and Watson, Judge.*

Baldwin, Judge.

This is an appeal from the Nov. 13, 1978 order of the United States International Trade Commission (Commission) which terminated investigation No. 337-TA-37, In the Matter of Certain Skateboards and Platforms Therefor, in view of its determination that no violation of section 337 of the Tariff Act of 1930 as amended by the Trade Act of 1974, 19 USC 1337,[1] exists in the importation

* The Hon. J. L. Watson, U.S. Customs Court sitting by designation.

[1] 19 USC 1337 provides, in pertinent part:

§1337. Unfair practices in import trade - Unfair methods of competition declared unlawful

(a) Unfair methods of competition and

unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declare unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other probisions of law, as provided in this section.

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Determinations; review

(c) The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section. Each determination under subsection (d) or (e) of this section shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of Title 5. All legal and equitable defenses may be presented in all cases. Any person adversely affected by a final determination of the Commission under subsection (d) or (e) of this section may appeal such determination to the United States Court of Customs and Patent Appeals. Such court shall have jurisdiction to review such determination in the same manner and subject to the same limitations and conditions as in the case of appeals from decisions of the United States Customs Court.

Exclusion of articles from entry

(d) If the Commission determines, as a result of an investigation under this

section, that there is violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health, and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States and United States consumers, it finds that such articles should be be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.

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into, or sale in, the United States of certain skateboards and platforms therefor. We reverse and remand.

Background

On Nov. 4, 1977, appellant, Richard L. Stevenson (Stevenson) filed an amended complaint with the Commission pursuant to §337, alleging that unfair methods of competition exist in the importation and distribution of certain skateboards alleged to infringe claims 1, 2, 7 and 8

of U.S. Patent No. 3,565,454 to Stevenson. The filing date of the Stevenson patent is Jun. 12, 1969. Claim 1 is the broadest claim, and reads:

1. A sport maneuvering device comprising:

a. an elongated platform for supporting a person, the platform having a forward end section and a rearward end section;

b. wheels coupled to and beneath the platform; and

c. an inclined foot-depressible lever coupled to the rearward end section of the platform, the lever being oriented so its plane slopes upwardly and rearwardly from the platform wherein a person positioned with one foot on the platform and the other foot resting on the lever may tilt the platform to a desired position by depressing the lever.

The subject device of the claims at issue is commonly known as a kicktail skateboard.

Foreign manufacturers and exporters named and served in the investigation were New Zeal Enterprises Co., Ltd., Lido Trading Co., Ltd. Prophet International Co., LTD., Hardy Enterprise Corp., and Amapala Marine (name corrected to S.K.B. de Nohdjuras [sic] by order issued Mar. 31, 1978). Importers named and served were Sportmaster, Inc., Marco Polo Co., National Sporting Goods Corp. Dixie Trading Co., and Woodline Products Co. The only named respondents to appear at the hearing (referred to collectively as the "Taiwan manufacturers") were New Zeal Enterprises, Co., Ltd., Prophet International Ltd., Lido Trading Co., Ltd. and Hardy Enterprise Corp. It was stipulated by the active parties that all named respondents were engaged in

either export to or importation into the United States of the articles in question.[2]

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[2]The Commission's brief reports that the following stipulations were entered into by the active parties below:

(1) There is importation of the skateboards in question into the United States;

(2) There is an industry devoted to production of the skateboards in question in the United States;

(3) The U.S. industry is composed of appellant and his licensees;

(4) The U.S. industry is efficiently and economically operated;

(5) Importation of the skateboards in question has the effect or tendency to destroy or substantially injure the U.S. industry; and

(6) If infringement is found as to one of the accused imported skateboards (staff exhibit No. 5 (SX-5), then all the accused imported skateboards infringe the Stevenson patent.

An evidentiary hearing was conducted by a Commission Administrative Law Judge (ALJ). His recommendation was that the Commission determine that there is no violation of §337 in the importation and sale in the United States of skateboards

and platforms therefor meeting claims 1, 2 7 and 8 of the Stevenson patent. This recommendation resulted from his conclusion that the subject claims are invalid as obvious under 35 USC 103 in view of prior art.

The Commission, with Chairman Parker dissenting and Commissioner Stern not participating, ordered the investigation terminated on the basis of a determination that no violation of §337 exists. As reflected in the joint opinion of Commissioners Moore and Bedell and the concurring opinion of Commissioner Alberger, the basis of this determination was the finding that claims 1, 2 7 and 8 of the patent to Stevenson are invalid for purposes of §337 as obvious in view of prior art pursuant to 35 USC 103.[3]

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[3]Commissioners Moore and Bedell, in their joint opinion, reasoned that:

The functional advantages of the

kicktail skateboard relative to the rocker skateboard arise from the fact that the front portion of the former is flat whereas that of the latter is curved. The continuously curved shape of the rocker board causes a dip in the center portion of the board that deepens as the curvature of the board increases. This dip can cause balance problems for the rider attempting to perform "wheelies", as well as increasing the likelihood that the center portion of the board will scrape against the ground. The presiding officer (ALJ) found that it would have been obvious to a person of ordinary skill at the timje the kicktail invention was made to eliminate the rocker board's balance and grounding problems by simply flattening its center and forward portions. We agree.

Issue

We face the dispositive issue whethere the subject matter of claims 1, 2 7 and 8 of the patent to Stevenson would have been obvious to one of ordinary skill in the art of designing skateboards at the time the invention was made.

OPINION

Standard of Review

[1] The Commission's brief argues

that the standard of review in this case is whether the determination of the Commission is clearly contrary to the weight of the evidence before it. We do not agree.

This determination was based on the Commission's finding that the subject claims of the Stevenson patent were invalid as obvious in view of prior art under 35 USC 103. However, "obviousness is a legal conclusion based on factual evidence. Graham v. John Deere Co. [383 U.S.], 1, 148 USPQ 459 (1966). ***and not a factual determination." In re Warner, 54 CCPA 1628, 1634 n5, 379 F.2d 1011 1016 n. 6, 154 USPQ 173, 177 n. 6 (1967). Therefore, the proper issue before us is whether the Commission erred, as a matter of law, in holding that the claims were invalid under 35 USC 103. In deciding this issue, the court will make "an

independent determination as to the legal conclusions and inferences which should be drawn from the findings of fact." See United States v. Mississippi Valley Generating Co. 364 U.S. 520, 526 (1961).

Prior Art

[2] Under §103 the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background the obviousness or non-obviousness of the subject matter is determined. Graham v. John Deere Co. supra at 17, 148 USPQ 446-467.

1) The Abbott Water Ski and Kelly Surfboard.

The Taiwan manufacturers argue that the Abbott water ski patent, U.S. Pat. No. 3,056,148 and the Kelly hydroplane

surfboard patent, U.S. Pat. 3,111,695, are relevant prior art. The patents disc8ose respectively, a water ski and a surfboard with an upturned aft plane.

[3] In a simple mechanical invention a broad spectrum of prior art must be explored and it is reasonable to permit inquiry into other areas where one of ordinary skill in the art would be aware that similar problems exist. In re Heldt, 58 CCPA 701, 433 F.2d. 808, 167 USPQ 676 (1970). Whether certain art is to be considered as prior art, we must consider the similarities and differences in structure and function of the inventions disclosed in the references. In re Ellis 476 F.2d 1370, 177 USPQ 526 (CCPA 1973). There is similarity in structure, with the waterski, the surfboard, and the kicktail deck all having an upturned aft plane. However, the problem of maneuvering a wheeled vehicle

across a hard surface would appear to differ significantly from the problem of maneuvering a surfboard or waterski through water, a fluid medium. Therefore, we agree with the majority of the Commission that one of ordinary skill in the art of designing skateboards would not have turned to these patents for guidance on a problem of maneuverability of a wheeled vehicle.

2) The Woodblock and Heelplate Skateboards

The Taiwan manufacturers also strongly argue anticipation of the subject claims by the Langton primitive woodblock skateboard and the Gottlieb heelplate skateboard. One witness, Mr. Langton, testified that he knew of a primitive woodblock skateboard prior to appellant's invention. This was a plan of wood with roller skates attached under neath, and a two-by-four shaved

off at an angle attached across the rear of the plank. No physical exhibit was offered. Mr. Langton is president of a company which manufactures kicktail skateboards. Another witness, Mr. Gottlieb, testified that he produced a "heelplate" skateboard prior to Stevenson's invention. This was a flat skateboard with a shoe heel attached to the upper surface of the board aft of the rear wheels. No physical exhibit was presented. Mr. Gottlieb also manufactures kicktail skateboards and at the time of his testimony was defending a patent infringement suit brought against Sears and Roebuck Company on the same patent now under consideration. Neither witness could recall the position of the rear wheels relative to the aft end.

[4] The evidence presented is insufficient to establish the existence of any

anticipating devices. Proof of such devices, alleged to be complete anticipations of the subject patent, must be clear and convincing to overcome the presumption of validity.[4] Uncorroborated

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[4]35 USC 282, in effect at the time appellant filed his complaint, provides in part:

> A patent shall be presumed valid. Each claim of a patent (whether in independent or dependent form) shall be presumed valid independently of the validity of such other claims; dependent claims shall be presumed valid even though dependent upon an invalid claim. The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting it.

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oral testimony of prior inventors or users with a demonstrated financial interest in the outcome of the litigation is insufficient to provide such proof. The Barbed Wire Patent, 143 US 275,284 (1892); Jones Knitting Corp. v. Morgan 361 F.2d 451, 149 USPQ 659 (3rd Cir 1966).

3) The Rocker Skateboard

[5] A physical exhibit, RX-13, of a rocker skateboard has been admitted into the record. A rocker board differs from a flat skateboard in that the platform of the rocker board has an arcuate, continuously curved configuration with the leading and trailing edges each higher than the center portion of the platform. A rocker board is sometimes referred to as a spoon board or a Hobie board, after its designer, Hobie Alter. Considering the testimony of the witnesses as well as the admissions of

Stevenson, who had manufactured rocker boards prior to his invention now under consideration, it is clearly established that rocker boards, exemplified by physical exhibit RX-13, are relevant prior art.

4) The Flat Skateboard

The flat skateboard, which has a flat platform, was acknowledged in the Stevenson patent specification as prior art.

Thus, on the record before us, the prior art includes, in addition to those patent references cited by the examiner in the examination of the Stevenson application, both flat skateboards and rocker skateboards.

The differences between the prior art represented by flat boards and rocker boards and the claims at issue are confined solely to the configuration of the platforms. The platform of the flat

skateboard is flat. The platform of the rocker board is arcuate shaped, forming a continuous curve with the leading and trailing ends each higher than the central portion of the platform. The platform of the claimed board has a section that is flat, with an inclined foot-depressible lever coupled to the rearward end section, the lever being oriented so its plane slopes upwardly and rearwardly from the platform.[5]

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[5] While claim 1 does not specifically limit the elongated platform to a flat shape, a review of the entire specification including the figures and particularly claim 2 which refers to "an intersection angle defined by the planes of the platform and lever," we conclude that the elongated platform recited in claim 1 is planar. Note that we do not read the limitation of claim 2 into claim 1, but instead use the recitation in claim 2, which is a part of the entire specification as filed, as evidence to determine the definition of elongated platform in claim 1.

Claim 2 reads:

2. The structure according to claim 1, wherein an intersection angle defined by the planes of the platform and

lever is between 20° and 50°.

Obviousness

[6] In determining the presence or absence of obviousness, and in considering the facts of record before it, a court must remain aware that a patent shall be presumed valid and that the burden of persuasion is and always remains upon the party asserting invalidity, as required by 35 USC 282. See n. 4 supra. Solder Removal Co. v. International Trade Commission, 65 CCPA 120, 582 F2d. 628, 199 USPQ 129 (1978), and cases cited therein. The arguments before us and the Commission below focus on the prior art comprising the rocker board and the flat board.

The rocker board has been introduced into the record as a physical exhibit rather than in the form of a written description in a patent

or otherwise. The physical exhibit of the rocker provides us with an example of an up-swept trailing end, or trail, which is inclined at an angle to a horizontal surface. We must consider the evidence of record to determine what, if any, teachings were provided to one of ordinary skill in the art at the time of Stevenson's invention that would have made it obvious to substitute the flat platform of the flat skateboard for the arcuate platform of the rocker, or conversely to combine the up-swept, inclined tail of the rocker with the flat skateboard.

1) Testimony of Witnesses

The physical exhibit, RX-13, of a rocker skateboard was introduced by Mr. Gottlieb, a manufacturer of skateboards, who testified that the rocker board existed prior to Stevenson's invention of the kicktail skateboard. Mr. Gottlieb

provided no testimony with regard to the actual teachings inherent in the rocker board at the time of appellant's invention.

Appellee's witness Mr. Langton, the president of the National Skateboard Association, Inc., testified to his early experience with primitive wood plank skateboards in the 1950's. He indicated that he did not perform many maneuvers on such boards and could recall only "straight ahead type of riding on an inclined hill or street." Mr. Langton did not become actively involved in skateboarding unti 1976, so hs testimony provides us with no understanding of the teachings of the rocker board concerning maneuverability at the time of appellant's invention.

Mr. Langton, an admittedly poor skateboard rider, found no difference in maneuverability between a rocker and a

flat skateboard. It was his opinion that the kicktail has achieved its commercial success for cosmetic reasons. The National Skateboard Association, Inc. has a manufacturing division that makes and sells skateboards of which ninety-five percent are kicktail skateboards.

Appellee's last witness was Mr. Criswell, who first began skateboarding in 1966 with a rocker board. He stopped for 19 months while in the military service, then began again at the end of 1969. However, Mr. Criswell provided no testimony with regard to any advantages of maneuverability to be gained from the up-swept tail of the rocker board during this period prior to appellant's invention. From his testimony, Mr. Crisswell appears to be a very accomplished skateboarder who has participated competitively since 1975. He testified that a rocker board would have certain

advantages over a flat board or a kicktail in bowl riding, which involves thrusting your weight up the side of a bank or bowl, turning at the top, then shooting down the bowl. However, he was in one bowl riding contest and used a kicktail skateboard. He has participated in free-style contests using a kicktail. Freestyle contests require each skateboarder to put together a performance routine requiring continuity of many tricks or maneuvers. He rides the same kicktail in downhill slalom races. He uses a kicktail "mostly just to know where [his] foot is, knowing where the back is. It's a feel." When he was asked why kicktails have captured so large a segment of the market, he suggested it was "probably because everybody in California rides them," though he was not sure why. We observe that Mr. Criswell, who by his testimony has been clearly

established to be a highly proficient skateboarder, contracts for the manufacture of and distributes skateboards, 100% of which are kicktails and uses a kicktail board himself in his exhibitions and competitive events.

Appellant's witness, Mr. Radkey, is a research scientist for a firm engaged by appellant to conduct an analysis of mechanical advantages of the geometry of the kicktail deck over the flat and rocker decks. His conclusions drawn from this analysis generally support specific advantages for the kicktail deck. In cross examination, Mr. Radkey did surmise that a rocker board and a kicktail board of a given identical angle would perform identically in regard to certain elements of his static analysis of the board geometries. Mr. Radkey, however, did no physical testing of the skateboards and has never ridden a skateboard.

Appellant's witness. Mr. Graham is president of the Pro-Am Skateboard Racing Asso., and has worked actively organizing various skateboard competitions. He testified that the kicktail provides definite advantages in performing free-style maneuvers. At appellant's request, Mr. Graham conducted a survey of the 500 members of his association, with 45% responding to the survey requests. The survey comprised 19 questions. A substantial number of members had ridden the flat, the rocker and the kicktail. The results of the survey indicated a decided preference for the kicktail.

This leaves the testimony of appellant, Mr. Stevenson to consider. Appellant acknowledged the existence of the rocker prior to his invention, he testified that the purpose of the rocker design was to simulate visually the look of a surfboard with a visual function as opposed to the

mechanical function of the kicktail.

Mr. Stevenson submitted a collection of five affidavits. The five affiants are all experienced skateboarders with competitive experience, some professional. The affiants all have ridden flats, rockers, and kicxtails and all find the kicktail to be superior ro the others. The affiants all agree that far greater maneuverability is possible with the kicktail. They all cite particular problems of imbalance associated with the rocker board.

2) Commercial Success

[7] The brief for the Taiwan manufacturers improperly asserts that commercial success can only tip the scales in favor of patentability in close cases. The cases cited by the Taiwan manufacturers, Digitronics Corp. v. New York Racing Association, Inc. 553 F.2d. 740, 193 USPQ 577, (2d Cir 1977),

International Telephone and Telegraph Corp. v. Raychem Corp. 538 F2d. 453, 191 USPQ 1 (1st Cir 1976), and cases cited therein, support their view that "[o]nly in a close case, in which application of the subjective criteria of nonobviousness in 35 USC 103 does not produce a firm conclusion, can these objective or secondary considerations be used to "tip the scales in favor of patentability.'" Digitronics supra at 748, 193 USPQ at 584. Contrary to the statement in Digitronics, we find nothing in Sakraida v. Ag Pro, Inc., 425 U.S. 273, 189 USPQ 449 (1976) that "laid to rest" the view followed by this court and enunciated in Graham v. John Deere Co. supra at 17, 36 148 USPQ at 467 474. The inference of obviousness drawn from prior art disclosures is only prima facie justificatio for drawing the ultimate legal conclusion that the claimed invention is obvious under 35 USC 103.

Therefore, it is necessary that such secondary considerations also be evaluated in determining the final validity of that legal conclusion. As presented in John Deere, such secondary considerations may serve to "guard against slipping into hindsight" and "to resist the temptation to read into the prior art the teachings of the invention in issue."

The ALJ found as fact, and it has been undisputed by either party, that presently kicktail skateboards constitute approximately 90-95% of production and sales in the skateboard industry. It is also clear from the record that the only difference between appellant's kicktail skateboard and the prior art flat skateboard is the provision by appellant of "an inclined foot-depressible lever coupled to the rearward end section of the platform." Appellant has submitted five affidavits of experienced competitive

skateboarders to attest to the fact that the kicktail is superior and provides far greater maneuverability than the flat or rocker boards. The survey of the members of the Pro-Am Skateboard Racing Asso. supports these affidavits by showing a decided preference for the kicktail because of its functional attributes. We also note that the majority opinion of Commissioners Moore and Bedell, as well as the alj, found the kicktail to possess functional advantages over the rocker. See n.3 supra. These factors establish prima facie a nexus between commercial success and the merit of appellant's invention, the provision of an inclined foot depressible lever. In re Felton, 484 F2d. 495, 179 USPQ 295 (CCPA 1973); In re Cavency, 55 CCPA 721, 386 F.2d. 917 155 USPQ 681 (1967).

In rebuttal, to show that the commercial success is unrelated to the

the merits of the invention, appellees have presented one witness, Mr. Langton, who gave his opinion that the commercial success was due to cosmetic reasons. Appellees presented one other witness, Mr. Criswell, who was not sure why kicktails have captured so large a segment of the market. Mr. Criswell is a highly proficient skateboarder who uses the kicktail because it helps him to know where his foot is. We earlier noted that Mr.Criswell, like Mr. Langton, has a personal financial interest in kicktail skateboards.

[8] Thus, appellees have chosen to rebut appellant's prima facie nexus between commercial success and the merit of his invention with the opinion testimony of a single witness with a demonstrated financial interest in the outcome. As noted earlier, we must subject such testimony to close scrutiny. The Barbed Wire

Patent, supra; Jones Knitting Corp. v. Morgan, supra.

We consider the testimony proferred by appellee to be insufficient to overcome the evidentiary value of that of appellants. The net result is a positive inference that the claimed skateboard would have been unobvious at the time the invention was made to one of ordinary skill in the art.

[9] After reviewing the evidence which has been summarized above, we find there is no evidence of record that would have suggested to one having ordinary skill in the art at the time of appellant's invention that the upswept tail of the rocker board would function to provide improved maneuverability. In fact, there is substantial evidence to the contrary, that problems of imbalance result from the curved deck of the rocker. There is nothing in the

testimony of appellee's witnesses to suggest that one having found it obvious to modify either the flat or the rocker boards in such a manner as to result in the claimed kicktail skateboard. The evidence tends to support a finding that definite advantages in maneuverability adhere to the claimed skateboard configuration. To read into the up-swept tail of the rocker board the teachings of appellant's kicktail is precisely the hindsight reasoning cautioned against in Graham v. John Deere, supra. Simplicity and hindsight are not proper criteria for resolving the issue of obviousness. In re Van Wanderham, 54 CCPA 1487, 378 F2d. 981 154 USPQ 20 (1967).

Infringement

[10] Claim 1 requires an "inclined foot-depressible lever coupled to the rearward end section of the platform." There are narrower claims in the patent

than those we have considered in this action which restrict the construction of the lever to the tubular construction shown in the drawings and appellant's preferred embodiment. It is not necessary to describe in the specification all possible forms in which the claimed limitation may be reduced to practice. Thus, we do not construe a broad claim to contain limitations expressed in the more narrow claims. Smith v. Snow, 294 US 1, 24 USPQ 26 (1935). In the instant case it is the provision by appellant of an inclined foot-depressible lever rather than the specific manner in which it is coupled to the skateboard platform which more accurately reflects appellant's invention. Therefore, we agree with the Commission that the term "coupled" is sufficiently broad to read on the on-piece molded skateboard platform of SX-5. See n.2, stipulation (6)

supra. We therefore need not consider application of the doctrine of equivalents.

Unenforceability

The Taiwan manufacturers assert that the Stevenson patent is unenforceable because during its prosecution before the Patent and Trademark Office (PTO) the patentee failed to disclose relevant prior art, i.e., the rocker board, to the examiner. Further, it is asserted that the patentee affirmatively misrepresented to the examiner the state of the art of skateboard construction in regard to (a) claiming adjustable wheels and (b) disclosing the means of attaching wheel assemblies to the skateboard platform. Therefore, they argue, the patent is unenforceable because it was obtained through inequitable conduct.

We turn to our opinion in Norton v. Curtiss, 57 CCPA 1384, 433 F2d 779, 167 USPQ 532 (1970), for guidance in

evaluating these charges of misconduct.

The Stevenson patent was allowed on the first action by the PTO. Consequently, the file history provides no representations made by Stevenson to the PTO other than those representations contained in the original application. Stevenson did disclose the conventional flat skateboard in his specification. He did not disclose the rocker board to the PTO.

[11] Stevenson has testified that he knew of the rocker board, that they were very common-place, and that he himself had built one for years. He did not disclose the rocker board to the PTO because "[t]hey did not work. It was so dramatically different that *** [he] just could not conceive *** why there would be any need to try to draw any parallel or any connection there. They are different, they don't work the same, their effective use is different, the market." The

evidence of record discussed above, including the consideration of commercial success, support these distinctions made by Mr. Stevenson. He clearly considered the conventional flat skateboard to be the most relevant prior art. Absent any evidence of bad faith on the part of Mr. Stevenson we are precluded from any finding of fraud or inequitable conduct on his part by his failure to disclose the rocker board to the PTO. Id. at 1406, 433 F2d. at 795, 167 USPQ at 545.

[12, 13] We find no merit in appellee's assertions of misrepresentations by Stevenson in regard to (a) claiming adjustable wheels and (b) disclosing the means of attaching wheel assemblies to the skateboard. In dependent claim 11, Stevenson claims adjustable wheels in combination with his k..cktail platform structure. It is inconceivable that this limitation in a dependent claim,

standing alone, in any way represents that he has invented adjustable wheels. He is claiming his kicktail platform structure in combination with adjustable wheels. He has in no way relied on this combination for the patentability of the independent claim. Similarly, his disclosure that the wheel assemblies are secured to the platform "by wood screws or th like" in no way teaches away from the use of rivets and bolts or any other known fastening devices. Such assertions by appellees are unfounded and unsupported by an evidence. Bare assertions can not provide the clear and convincing evidence required to establish fraud or inequitable conduct. Id. at 1408, 433 F.2d at 797, 167 USPQ at 547.

Conclusion

Accordingly, we conclude, from the evidence of record, that appellees have failed to carry their burden of persuasion in asserting the invalidity of the

subject claims of the Stevenson patent.

We reverse the Commission's determination that there is no violation of §337 because, from the evidence of record, we conclude that the subject matter as a whole of claims 1, 2 7 and 8 of the Stevenson patent would not have been obvious to one of ordinary skill in the art of designing skateboards at the time the invention was made. We remand to the Commission for action consistent with this opinion.

Reversed and Remanded.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

----------x
Richard Lawrence Stevenson
Plaintiff
-v-
Mojo Boards; South Bay
Recreational Products, Inc.
Defendants.

Richard Lawrence Stevenson
Plaintiff
-v-
Grentec Inc.
Defendant.

Richard Lawrence Stevenson
Plaintiff
-v-
Wayne Brown d/b/a/
Wayne Brown Surfboards,
Defendant.
----------x

FILED:
Dec. 25,1976

Nos. CV 75-2297-RF, 75-3223-RF and 75-4155-RF.

DECLARATION

I, Hobie Alter, declare that I am a citizen of the United States of America, residing at 35605 Beach Road, Capistrano Beach, California.

I am the sole owner of the Hobie Surfboard Company of Dana Point, California, a major manufacturer of

surfboards in the United States, and have been at least from 1955 up to the present.

I was retained by the Vita-Pak Corporation in 1964 to design skateboards for that company, which they marketed under the name "Hobie Super Surfer".

One type of "Hobie Super Surfer" skateboard which I designed for the Vita-Pak Corporation was a fiberglass rocker, or spoon-shaped, or swayback, styled skateboard which was introduced to the market in 1965.

A drawing of the Hobie Super Surfer rocker, or spoon-shaped, or swayback, styled skateboard is attached to this declaration.

The purpose of the rocker, or swayback or spoon-shaped skateboard was to bring more of the design concept of surfboards to the styling of skateboards.

The purpose of the kicktail concept,

as described in Stevenson Pat. 3,565,454 is to allow total freedom of operation during the very popular maneuver called "kick turning", which allows the more difficult 180° half circle turns, or the 360° complete circle turns, to be safely accomplished by the average skateboarder.

I find the kicktail or kick lever or angled-up rear portion of a skateboard such as described in the Stevenson Pat. 3,565,454 a separate and distinctly different concept than the rocker or swayback design of my "Super Surfer" skateboard and, to the best of my knowledge. the concept of the kicktail, or kick lever, or angled up rear portion of a skateboard is original with Larry Stevenson.

I declare further that all statements made herein of my knowledge are true and that all statements made on information and belief are believed to be

true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

Dated: May 24, 1976.

Hobie Alter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

----------x

Richard Lawrence Stevenson,
Appellant,

-v-

Grentec, Inc.,
Appellee.

Richard Lawrence Stevenson,
Appellant,

-v-

Mojo Boards, South Bay
Recreational Products Inc.
Appellees.

FILED:
Aug. 11, 1981

Richard Lawrence Stevenson
Appellant,

-v-

Wayne Brown d/b/a
Wayne Brown Surfboards,
Appellee.

----------x

Nos. 79-3771, 79-3772-75-3773.

DECLARATION OF DEFENDANT/APPELLEE
SOUTH BAY RECREATIONAL PRODUCTS INC.
IN SUPPORT OF PETITION FOR REHEARING
BY PLAINTIFF/APPELLANT.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I hereby declare and represent the following:

1. My name is Charles Vegher and I

am the President and owner of South Bay Recreational Products Inc. which is a party named in this case and in particular Appeal No. 79-3772.

2. I know Mr. Richard Lawrence "Larry" Stevenson and am familiar with his U.S. Pat. No. 3,565,454 granted Feb. 23, 1971 for the kicktail skateboard. My company has been a licensee under the patent but has not manufactured any kicktail skateboards under the license. My company also had a license to distribute Makaha roller skates but it was terminated about a year ago.

3. I believe that all of the other three defendants named in this case are bankrupt, in liquidation or have otherwise discontinued business operations.

4. I am aware of the judgments and rulings of record by the District Court and Appellate Court in this case. I am also mindful of the case entitled

In Re Certain Skateboards and Platforms Therefor and the ruling of the United States International Trade Commission dated Nov. 13, 1978 and the ruling of the Court of Customs and Patent Appeals on Dec. 20, 1979.

5. In view of the many Court rulings and all of the prior art developed in the legal proceedings including the "rocker" skateboard - I believe that Mr. Stevenson's U.S. Pat. No. 3,565,454 granted Feb. 23, 1971 is entitled to protection and enforcement.

I declare under penalty of perjury that the foregoing declaration is true and correct.

Executed on Aug. 10, 1981.

Charles Vegher,
South Bay Recreational Products Inc.